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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

NewComm Wireless Services Petition for
Waiver of Section 54.307(d) of the FCC's
rules

CC Docket No. 96-45

**NewComm Wireless Services Petition for Waiver of
Section 54.307(d) of the FCC's Rules**

NewComm Wireless Services, Inc. d/b/a Movistar ("NewComm"), pursuant to section 1.3 of the Rules and Regulations of the Federal Communications Commission ("Commission"),¹ hereby petitions for waiver of section 54.307(d) of the Commission's Rules.² Due to the Puerto Rico Telecommunications Regulatory Board's ("TRB") delay in notifying NewComm of its designation as an Eligible Telecommunications Carrier ("ETC") for approximately two months, NewComm was unable to file its interstate common line support ("ICLS") certification and line count data within sixty days of the adoption date of the ETC designation order as required under section 54.307(d) of the FCC's rules.³

NewComm requests that it begin receiving universal service support as of January 11, 2006, the date that the TRB designated NewComm as an ETC. To this end, NewComm requests a waiver of section 54.307(d) given the unique circumstances of this case. Grant of

¹ 47 C.F.R. § 1.3.

² 47 C.F.R. § 54.307(d).

³ *Id.*

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NewComm's request to receive universal service support as of its ETC designation date is consistent with the public interest, the Commission's universal service goals, and the rationale and policy behind the Commission's March 17, 2005, *Report and Order*.⁴

Background. NewComm is a PCS company providing wireless service in Puerto Rico. NewComm sought designation as an ETC in Puerto Rico, which was granted by the TRB on January 11, 2006.⁵ Notice of the designation, however, was not sent to NewComm until final certification and signature by the TRB on March 1, 2006.⁶ NewComm received this notice in the mail approximately one week later, around March 8, 2006. Shortly thereafter, on March 29, 2006, NewComm filed with the Commission and the Universal Service Administrative Company ("USAC") line count information and the required certification under section 54.904(a) that all support would be used for provision, maintenance, and upgrading of the facilities and services for which the support is intended.⁷

Strict certification and line count filing deadlines are an essential component of the administration of the universal service fund. Nevertheless, they have historically frustrated the ability of newly designated ETCs to receive universal service funds in a timely manner.⁸ In

⁴ *Federal-State Joint Board on Universal Service, Report and Order*, 20 FCC Rcd 6371 (2005) ("*Report and Order*").

⁵ *NewComm Wireless Services, Inc. d/b/a MoviStar, Resolution and Order*, Case No. JRT-2005-SU-0006 (granted Jan. 11, 2006).

⁶ *Id.*

⁷ 47 C.F.R. § 54.904(a).

⁸ *See, e.g., Federal-State Joint Board on Universal Service, West Virginia Public Service Commission, Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Non-Rural Carriers, Order*, 16 FCC Rcd 5784 (2001) (granting a waiver of the October 1 certification filing deadline); *Federal-State Joint Board on Universal Service, RFB Cellular, Inc., Petitions for Waiver of Sections 54.314(d) and 54.307(c) of the Commission's Rules and Regulations, Order*, 17 FCC Rcd 24387 (2002) (granting a waiver of the October 1

order to address this problem, the Commission issued its *Report and Order* allowing receipt of funds for competitive ETCs as of the ETC designation date.⁹ Under this new approach, competitive ETCs are eligible for support as of their designation date upon the filing of their certification and line-count data within sixty days of the designation date.¹⁰

NewComm understood that the relevant date for the sixty-day window was March 1, 2006 (the date of final certification by the TRB). Consistent with that understanding and after direct consultation with USAC, NewComm prepared and submitted its certification and line count information on March 29, 2006 well within the sixty-day window under section 54.307(d), and directly prior to the normal March 30 submission deadline.

Subsequently, USAC informed NewComm that the relevant date for sixty-day deadline was January 11, 2006, and that NewComm filed its required documentation outside that sixty-day window.¹¹ Given the unique circumstances surrounding its ETC designation, it is unclear if

certification filing deadline, the March 30 line count filing deadline, and the September 30 line count filing deadline); *Federal-State Joint Board on Universal Service, Guam Cellular and Paging, Inc., Petition for Waiver of Section 54.314 of the Commission's Rules and Regulations*, Order, 18 FCC Rcd 7138 (2002) (granting a waiver of the October 1 certification filing deadline); *Federal-State Joint Board on Universal Service, Western Wireless Corporation, Petition for Waiver of Section 54.314 of the Commission's Rules and Regulations*, Order, 18 FCC Rcd 14689, (2003).

⁹ *Report and Order* at ¶ 42.

¹⁰ *Id.* at ¶ 43.

¹¹ NewComm first identified a potential problem with its receipts of high-cost support with the May 2006 publication of the universal service distribution appendices in which NewComm was not listed as eligible to receive support for either the first or second quarter of 2006. In multiple subsequent discussions with USAC, NewComm was informed for the first time that it had not met the 60-day filing window. In addition, at that time, NewComm was instructed to file additional line count data for June 30, 2005, in addition to the line count data provided on March 29, 2006. NewComm has since filed the additional line count data with USAC. Section 54.307(d) is ambiguous as to the specific line count data required to be filed within the sixty-day window, and NewComm asks that its submission of June 30, 2005 line count data be included within this waiver request to the extent necessary under FCC Rules.

NewComm – even if it believed that January 11 was the relevant date – could have provided the necessary documentation in the limited time available. Specifically, because NewComm did not receive notice of its designation until almost two months after the TRB adopted its Resolution and Order, NewComm would have needed to submit the required line count and certification to the Commission and USAC within days of receiving notice of designation in order to meet the sixty-day deadline. The need to verify and collect the necessary line count data and ensure an accurate self-certification, however, would have likely foreclosed the ability of NewComm to satisfy the strict requirements of section 54.307(d). Nevertheless, NewComm provided the materials in less than thirty days of its notification of its ETC status. NewComm, therefore, seeks waiver of section 54.307(d) to allow it to qualify for receipt of high-cost universal service support as of January 11, 2006.

Waiver Would Advance the Commission's Universal Service Goals. Denial of universal service support to NewComm for the period between January 11, 2006 (date of ETC designation) and July 1, 2006 (first day support would be provided based on strict application of the rules) would be inconsistent with the underlying purpose of the FCC's universal service policies, which is to ensure all Americans have access to affordable telecommunications service.¹² Universal service funding is vital to NewComm's ability to perform its role as an ETC in Puerto Rico, allowing it to better serve its customers, maintain, upgrade, and expand its networks, and provide quality telecommunication services at affordable rates. In particular,

¹² *Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776 (1997).*

given the low penetration rate in Puerto Rico, the need for carriers willing to invest and expand coverage in Puerto Rico is critical.¹³

Further, section 254 of the Act highlights the importance of providing support to insular areas, and NewComm is committed to ensuring that Puerto Rico's high-cost insular communities receive mainland quality services.¹⁴ Specifically, NewComm has invested aggressively in the Puerto Rico market: since the last quarter of 2005 alone, NewComm has invested \$8 million to expand its network to underserved areas within central Puerto Rico with 20 new cell-sites. Many of these communities have difficulty accessing wireline service. With the assistance of direct universal service funding, NewComm intends to invest in 60 more cell-sites this year to further expand its network to underserved communities. Therefore, granting NewComm's request for waiver is in the public interest and would further the goals of the universal service program.

Waiver is Consistent with the Objective of the Commission's Report and Order. The Commission intended through its *Report and Order* to make it possible for all ETCs to receive universal service support funding as of their designation date, regardless of when they were designated and how that date fit into the line count and certification filing schedules. The ultimate goal was for "customers of newly designated ETCs to begin to receive the benefits of universal service support as of the ETC's designation date."¹⁵ The new rule created a sixty-day filing deadline balancing the need for ease of program administration for USAC and the need to ensure that new ETCs have sufficient time to provide all necessary information.¹⁶

¹³ *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, FCC 05-205, ¶ 31 (2005).

¹⁴ 47 U.S.C. § 254(b)(3).

¹⁵ *Report and Order* at ¶ 42.

¹⁶ *Id.* at ¶¶ 42-43.

In this regard, the express intent of the *Report and Order* was to prevent the "onerous" result of an ETC being denied nearly six months of support when it was notified of its designation without sufficient time to meet strict program deadlines.¹⁷ In this unusual case – analogous to the factual situation the *Report and Order*'s accommodation for newly designated ETCs was designed to cure – NewComm was unable to meet the new filing deadline from the *Report and Order* through no fault of its own due to the TRB's delay in notifying NewComm of its ETC status, and good faith confusion as to the relevant date under the sixty-day window. Nonetheless, New Comm provided its documentation in a timely manner, underscoring NewComm's compliance with the spirit of the new rules. As a result, granting NewComm a waiver of section 54.307(d) would be consistent with the rationale behind the *Report and Order*, and would provide for a "more effective implementation of overall policy" in this limited instance.¹⁸

Further, prior to issuance of the *Report and Order*, the Commission has long recognized that denying support to competitive ETCs that were unable to meet filing deadlines due to the timing of their designation "would undermine the Commission's goals of competitive neutrality."¹⁹ That is no less the case here. The Commission has consistently waived universal service filing deadlines where their enforcement would be inequitable to high-cost carriers and

¹⁷ *Federal-State Joint Board on Universal Service, Grande Communications, Inc, Petition for Waiver of Sections 54.307 and 54.314 of the Commission's Rules and Regulations*, Order, 19 FCC Rcd 15580, ¶ 9 (2004) ("*Grande Waiver*").

¹⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *see also Telephone USA of Wisconsin, LLC and GTE North Inc. Joint Petition for Waiver of Definition of "Study Area" Contained in the Appendix to Part 36 of the Commission's Rules (Glossary) and of Section 69.3(e)(9) of the Commission's Rules*, Order, 15 FCC Rcd. 15032, ¶ 8 (2000) (explaining that waiver is appropriate "if special circumstances warrant a deviation from the general rule").

¹⁹ *Grande Waiver* at ¶ 10; *see also* n. 8 *supra*.

consumers, and would more broadly be inconsistent with the goal of nationwide access to reasonably priced telecommunications services.²⁰

Waiver is in the Public Interest. The Commission may use its discretion to waive a provision of its rules if good cause is shown.²¹ Such use of discretion is appropriate where strict compliance with a rule is "inconsistent with the public interest."²² Here, denial of nearly six months of support to NewComm is inconsistent with the public interest and the Act's universal service mandate, as it would hamper NewComm's ability to provide its customers quality service at affordable prices, and to expand, upgrade, and maintain its network. As expressed above, the clear need for universal service support in insular areas, particularly Puerto Rico, further confirms the need for FCC action to ensure an equitable result.

²⁰ See e.g., *Grande Waiver* at ¶ 11.

²¹ 47 C.F.R. § 1.3.

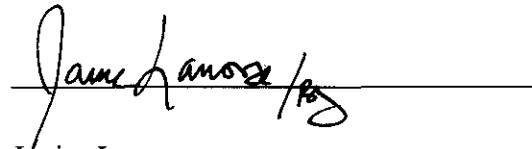
²² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

Conclusion. For the foregoing reasons, NewComm respectfully requests a waiver of section 54.307(d) to ensure that a newly designated ETC may receive universal service support as of its ETC designation.

Respectfully submitted,

NEWCOMM WIRELESS SERVICES, INC

By:

A handwritten signature in black ink, appearing to read "Javier Lamoso", is written over a horizontal line.

Javier Lamoso
President
NewComm/MoviStar
City View Plaza, Suite 700
Road 165 No. 48
Guaynabo, PR 00936-8669

July 20, 2006

CERTIFICATE OF SERVICE

True and correct copies of foregoing were sent by first class mail to the following parties on July 20, 2006.

Universal Service Administrative
Company
2000 L Street, NW
Suite 200
Washington, DC 20036

Jeremy Marcus
Acting Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission